BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

WILLIAM PAUL BECKHAM, Claimant, v. IDAHO CONCRETE, Employer, and LIBERTY MUTUAL FIRE INSURANCE, Surety, Defendants.	)	**IC 04-525105** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** Filed December 29, 2005

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Lora Rainy Breen. Referee Breen was on military leave at the time set for hearing and the matter was reassigned to Referee Rinda Just, who conducted a hearing in Boise, Idaho, on July 5, 2005. J. Brent Gunnell of Caldwell represented Claimant. W. Scott Wigle of Boise represented Defendants. The parties submitted oral and documentary evidence and post-hearing briefs. The matter came under advisement on September 22, 2005 and is now ready for decision.

ISSUES

By agreement of the parties at hearing, the issues to be decided are:

1. Whether the condition for which Claimant seeks benefits was caused by the industrial accident of November 1, 2004;

2. Whether and to what extent Claimant is entitled to the following benefits:

A. Medical care;

B. Temporary partial and/or temporary total disability benefits (TTD/TPD); and

C. Attorney fees for unreasonable denial of the claim.

CONTENTIONS OF THE PARTIES

Claimant contends that on November 1, 2004, while preparing to wash down his cement truck at the Middleton plant, he slipped on the metal wash rack and fell, sustaining a medial meniscal tear in his left knee. He asserts that he is entitled to medical care and income benefits as a result of his industrial injury, as well as attorney fees because Defendants unreasonably denied his workers' compensation claim.

Defendants do not dispute that Claimant fell while preparing to wash his cement truck on November 1, 2004. They assert he sustained only a minor superficial injury to his left knee and shin as a result of the fall. Claimant is not entitled to any workers' compensation benefits because Claimant's medial meniscal tear was not caused by the November 2004 accident. Since his claim was not wrongfully denied, Claimant is not entitled to attorney fees.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant, Larry Stearns, Ron Taylor, Larry King, Benny Ellsworth, and Sheryl Beckham taken at hearing;

2. Claimant's Exhibits 1 through 12, admitted at hearing; and

3. Defendants' Exhibits 1 through 8, admitted at hearing.

After having considered all the above evidence and the briefs of the parties, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

FINDINGS OF FACT

1. At the time of hearing, Claimant was 39 years of age. He resided in Nampa, Idaho, with his wife and five minor children. Claimant has a long work history of driving truck in both California and Idaho. At the time of the hearing, he was an owner-driver for a long haul trucking company. Claimant is a large man, about six feet six inches in height and weighing almost three hundred pounds.

PRIOR WORKERS' COMPENSATION CLAIMS

2. While residing in California, Claimant sustained a work-related low back injury. Time loss benefits were paid. The claim was closed via settlement.

3. In about 2000, while working in California, Claimant filed a workers' compensation claim for a shoulder injury. Claimant accepted a settlement to resolve the claim.

4. In 2002, just before moving to Idaho, Claimant injured his right knee in an industrial accident. The injury resulted in surgery to repair a meniscal tear.

5. Upon moving to Idaho in 2003, Claimant went to work for Low's Redi Mix in Boise. In April 2004, he reported an injury to his lower back. Claimant's Complaint in that proceeding, IC 04-509232, was dismissed without prejudice on September 23, 2005 at Claimant's request.

NOVEMBER 1, 2004 ACCIDENT

6. Employer hired Claimant as a cement truck driver in August 2004. Claimant's starting wage was $12.20 per hour. Claimant was a good employee, and received two bonuses in September and a pay increase to $13.00 per hour in October 2004.

7. On November 1, 2004, Claimant reported to work at the usual time. It was early in the morning and cold when Claimant's truck was loaded for delivery. After loading and before leaving the yard, trucks are washed on a metal wash rack. Claimant pulled his truck onto the rack and stepped out of the cab. When he placed his right foot on the rack, his foot slipped out from under him and he fell, landing with all his weight on his left leg, which was beneath him and twisted to the side.

8. Claimant called for assistance on his mobile device. He managed to extricate his left leg and get to his feet. Claimant started to make his way to the drivers' break room; a co-worker met him en route and assisted Claimant to the break room. Claimant waited in the drivers' break room until Larry Stearns, the individual designated by Employer to investigate accidents and see that injured workers receive medical care, reached the plant. Mr. Stearns arrived and took Claimant to a St. Alphonsus Urgent Care (St. Al's) facility for treatment. Mr. Stearns had difficulty getting Claimant into his vehicle for transport to St. Al's because of Claimant's size and his inability to bear weight on his left leg.

COURSE OF TREATMENT

9. At St. Al's, Claimant saw Lawrence Sladich, M.D. Claimant reported no previous history of injury to the left knee. At the time of exam, the lower left extremity was not weight-bearing. On exam, Dr. Sladich observed severe pain upon flexion at 150 degrees, mainly along the medial aspect of the affected knee. Claimant demonstrated weakness with both extension and adduction against resistance. Dr. Sladich noted marked tenderness over the medial proximal tibial area and moderate tenderness along the medial mid-tibia area. Dr. Sladich reported no obvious effusion or fluid on the knee and minimal swelling. X-rays were negative for fracture. Dr. Sladich diagnosed a left tibia contusion and sprained left knee. He prescribed

an anti-inflammatory analgesic, ice, elevation, and no weight-bearing for forty-eight hours. Claimant was permitted to return to work with the following restrictions: "He needs to use the crutches; he needs to wear the brace on that left knee; and no weight bearing on that left leg." Claimant's. Ex. 5, Nov. 1, 2004 chart note, p. 3.

10. Claimant returned to the clinic on November 3. He reported his condition as somewhat better, although he described popping in his left knee. On exam, Claimant exhibited mild tenderness over the medial joint line, marked tenderness on his left shin, and crepitance with flexion and extension of the left knee. Dr. Sladich continued Claimant on the prescription anti-inflammatory analgesic, and placed a compression wrap on the lower left extremity. Claimant was advised to continue to ice the left leg two to three times per day. Restrictions included no squatting or kneeling. Dr. Sladich scheduled a follow-up appointment for November 15.

11. On November 4, Claimant returned to work and drove a cement truck all day. By the end of the day, he was in severe pain. He did not return to work on November 5, but went instead to St. Al's. Dr. Sladich was unavailable, so Claimant was seen by Shane R. Johnson, MS, PA-C. Claimant reported pain over the superolateral aspect of the patella and a sensation of "catching" and pain underneath the patella upon full extension. He continued to report pain along the medial joint line. PA-C Johnson reviewed the x-ray films and saw no evidence of any ligament damage or fracture. He switched Claimant to a different prescription anti-inflammatory analgesic, restricted his driving to eight hours per day, and scheduled an evaluation for the following week.

12. When Claimant returned to St. Al's on November 9, he again saw PA-C Johnson. Johnson was able to palpate the popping sensation that Claimant reported over the lateral

compartment of the patella, and also noted feeling "snapping" in Claimant's patella retinaculum. Johnson also noted some chondromalacia of the inferior aspect of the patella. Because Claimant had not responded to conservative treatment, Johnson felt that an MRI was needed to evaluate the knee, especially the superior lateral compartment of the retinaculum and the undersurface of the patella.

13. Claimant returned to St. Al's on November 15 and saw Dr. Sladich. No MRI had been scheduled because Employer had not filed a workers' compensation claim with Surety. Claimant reported that he still had pain along the superior lateral part of his left patella and some medial left knee pain. He reported that stairs were particularly problematic with popping and clicking and a feeling of instability. Findings on exam were consistent with previous findings—increased pain with full flexion, weakness upon extension with resistance, point tenderness and crepitance along the superior lateral aspect of the patella, and point tenderness over the medial joint line. Dr. Sladich prescribed physical therapy, two to three visits per week for two weeks, and stressed the need for an MRI. Claimant was released with restrictions, including "[n]o squatting/kneeling, no walking on rough, uneven ground, and no jump [sic]. Sedentary work only." *Id.*, Nov. 15, 2004 chart note, p. 2.

14. When Claimant returned for his next appointment on November 22, he reported that he was still having a "fair amount of pain in that left knee." *Id.*, Nov. 22, 2004 chart note, p. 1. Claimant had neither the physical therapy nor the MRI due to Surety's failure to authorize the treatment. Continued restrictions included no squatting, kneeling, or jumping; sedentary work only; avoid stairs. Dr. Sladich scheduled follow-up for one week and also noted:

> After [Claimant] left I talked with Julie at Liberty Northwest and it wounds [sic "sounds"] like William has had several workers's [sic] comp cases over the years and he in fact did have a left knee injury, so they are probably going to deny the claim.

Id., at p. 2.

15. Claimant did not return to Dr. Sladich again until March 28, 2005:

> Patient is a 39-year-old white male who I originally saw back in November for a left knee injury. I wanted to do an MRI on his left knee, as I felt that he might have had a meniscus tear. Apparently, the worker's [sic] comp. insurance denied his claim, questioning a previous left knee injury; therefore I have not seen him for the past 4 months.

Id., Mar. 28, 2005 chart note, p. 1. On this visit, Claimant reported that he continued to have intermittent pain and swelling in the knee with certain movements, particularly when he goes up stairs. The pain was focused on the medial aspect of the left knee and down the shin. On exam, Claimant had full range of motion but increased pain upon full flexion. Strength was normal except for weakness on abduction. Claimant demonstrated moderate point tenderness over the medial joint line and mild point tenderness over the lateral joint line. Dr. Sladich remained concerned that Claimant had a left medial meniscal tear and ordered an MRI. Dr. Sladich released Claimant to work with restrictions. In the meantime, he continued to treat with anti-inflammatory analgesics. By telephone call the same day, Surety authorized the MRI but no future follow-up visits.

16. The MRI of Claimant's left knee was done on April 27, 2005. It showed:

> Multiple fissure-like tears involving the posterior horn of the medial meniscus.
>
> Lateral meniscus is intact.
>
> Ligaments and tendons are intact.
>
> There is considerable thinning of the lateral aspect of the retropatellar cartilage.

Claimant's Ex. 7, Apr. 27 2005 MRI report, p. 1.

17. Based on the results of the MRI, Dr. Sladich referred Claimant to Kyle L. Palmer, M.D., an orthopedic surgeon. Dr. Palmer first saw Claimant on June 2, 2005. Claimant reported

pain throughout the knee and occasional swelling particularly related to walking, stair climbing and squatting. On exam, Dr. Palmer noted hyperextension of the left knee, tenderness along the lateral and medial joint lines and the inferior patella, a positive grind test, and restricted excursion of the patella both medially and laterally. He concluded:

> At this time the patient seems to have a symptomatic medial meniscus tear of the left knee. It sounds like he has a possible secondary patellofemoral irritation. From his history it sounds consistent with the injury described on November 1, 2004.

Claimant's Ex. 8. Dr. Palmer recommended quad strengthening to alleviate the patellofemoral irritation, and opined that if the knee continued to bother him, Claimant was a candidate for arthroscopic partial medial meniscectomy.

18. At the request of Defendants, Claimant underwent an independent medical exam (IME) performed by George A. Nicola, M.D., on June 16, 2005.[1] The history of Claimant's knee complaints as set out in Dr. Nicola's report is consistent with the Claimant's previous reports as to how the November 2004 accident occurred, and is a fair summary of Claimant's limited medical treatment up to and including his visit with Dr. Palmer. On exam, Dr. Nicola found that Claimant walked with an antalgic gait, referable to his left lower extremity, and demonstrated tenderness over the medial and lateral joint line both parapatellar and posteriorly. Dr. Nicola observed reduced range of motion in the left knee, and some retinacular tightness over the lateral compartment of his patella, which Dr. Nicola believed to be bilateral. Dr. Nicola also noted some left-sided weakness in the quadriceps. Dr. Nicola opined that Claimant's symptoms were not consistent with a torn meniscus as there was no effusion or swelling around the knee, and no evidence of an acute meniscal injury on the MRI. He further opined that Claimant's fall, as it

[1] The date June 2, 2005, which appears on the first page of Dr. Nicola's report is clearly in error, as the exam was not conducted until June 16. The correct date appears on all subsequent pages.

was described, would more likely result in a lateral rather than a medial meniscal tear. In fact, Dr. Nicola disputed that Claimant had sustained any acute injury on November 1, 2004 because there was no acute swelling or ecchymosis noted by Dr. Sladich upon initial exam. Dr. Nicola did concede that Claimant had some chondromalacia and he recommended a conservative course of therapy and electrical stimulation. Dr. Nicola did not believe Claimant to be a surgical candidate.

POST-ACCIDENT EMPLOYMENT

19. Claimant's initial restrictions, including no weight-bearing on the lower left extremity, precluded his driving a cement truck, because cement trucks require frequent and prolonged use of the clutch, which is operated with the left foot. As several of Claimant's co-workers testified, when delivering cement it is sometimes necessary to move the truck smoothly only inches at a time, necessitating almost constant pressure on the clutch, sometimes for as much as an hour.

20. On November 2, the day following the accident, Claimant reported for work. He was sent to the Caldwell plant, where there was nothing for him to do. He sat most of the morning except for twenty minutes that he did some filing, and was sent home. Claimant did not work on November 3.

21. November 4 was the day that Claimant tried driving again, and he worked more than eleven hours. At the end of the day, Claimant was in extreme pain. Claimant did not work on November 5, instead going back to St. Al's.

22. The week of November 8 through November 12, Claimant was paid for a total of 29.63 hours. The week of November 15 through November 19, Claimant was paid for a total of 25 hours. The week of November 22 through November 26, Claimant was paid for a total of 15

hours. Claimant was paid for a total of 9 hours for November 29 and November 30. Claimant was terminated on December 1, 2004. The reason given for the discharge was that Claimant "did not make probation." Claimant's Ex. 10, Separation Notice, p. 72.

23. Claimant did not perform 78.63 hours of services for Employer during the period from November 8 until his termination on December 1. Employer had very little real work that Claimant could perform that was within his restrictions, and so he sat doing nothing for most of those 78.63 hours. At the time of his termination, Claimant was limited to sedentary work only.

24. Following his March 28, 2005 appointment with Dr. Sladich, Claimant returned to work as an owner/operator for a long-haul trucking firm. At the time of hearing, Claimant was netting $1,500 per week.

25. Claimant is a credible witness.

DISCUSSION AND FURTHER FINDINGS

CAUSATION

26. Although the parties have raised multiple issues in this proceeding, the fundamental and overriding question is one of causation. The burden of proving causation in an industrial accident case is on the claimant.

> The claimant carries the burden of proof that to a reasonable degree of medical probability the injury for which benefits are claimed is causally related to an accident occurring in the course of employment. Proof of a possible causal link is insufficient to satisfy the burden. The issue of causation must be proved by expert medical testimony.

Hart v. Kaman Bearing & Supply, 130 Idaho 296, 299, 939 P.2d 1375, 1378 (1997) (internal citations omitted). "In this regard, 'probable' is defined as 'having more evidence for than against.'" *Soto v. Simplot,* 126 Idaho 536, 540, 887 P.2d 1043, 1047 (1994).

27. Claimant asserts that his torn meniscus was the result of his November 1, 2004 accident. He relies on the opinions of Dr. Sladich and Dr. Palmer as set out in the medical records. Dr. Sladich was Claimant's treating physician from the date of the accident. He suspected a meniscal tear as early as November 2004, as evidenced by his chart note of March 28, 2005. This was Claimant's first visit to Dr. Sladich since Surety had denied his claim the previous November. In the chart notes, Dr. Sladich observed that he had not seen Claimant since the previous November. He wrote that he had wanted to do an MRI on Claimant's left knee at that time, as he felt that Claimant might have a meniscus tear. The MRI, done the following month, did in fact show a meniscal tear. Dr. Sladich then referred Claimant to Dr. Palmer, an orthopedic surgeon, for a consult. Dr. Palmer took Claimant's history, reviewed the MRI films, and did an exam. He concluded that Claimant's torn meniscus was consistent with the mechanism of injury described by Claimant. Claimant averred, and no evidence to the contrary has been forthcoming, that he had no prior injuries to his left knee, and no problems with his left knee prior to the accident.

28. Defendants rely on the opinion of Dr. Nicola in support of their position that Claimant's injury was not the result of the November 2004 accident. Defendants assert that Dr. Nicola's opinion is more reliable than Dr. Palmer's in part because Dr. Nicola reviewed all of the medical records, whereas Dr. Palmer placed undue reliance on the subjective history provided by Claimant. For the reasons discussed hereafter, the Referee finds that the opinions of Drs. Sladich and Palmer are the most persuasive and finds that Claimant has established causation to a reasonable medical probability based upon their records.

29. The only medical records discussed in Dr. Nicola's report are the records from Dr. Curran concerning Claimant's right knee surgery and the MRI images of the left knee taken

six months after the accident. Nowhere in his report does Dr. Nicola state that he reviewed any other pertinent medical records, nor does he identify with any specificity what other records he might have reviewed. Defendants may have provided Claimant's entire medical history to Dr. Nicola, but if Dr. Nicola did actually review those records, he neglected to say so in his report. The Referee has had an opportunity to review a goodly number of IME reports from a number of physicians. It is standard practice to include in an IME report a specific listing of the records that the IME physician or panel of physicians reviewed in reaching their conclusions. Absent this vital information, it is not clear how Dr. Nicola's information was any different, or in particular, any better, than the information that Drs. Sladich and Palmer had when they rendered their opinions.

The tenor of Dr. Nicola's report reveals some pre-conceptions about Claimant's situation. For example, Dr. Nicola's conclusions begin with reference to Claimant's "alleged" accident, although Defendants were not disputing that an accident had occurred at the time and place and in the manner alleged by Claimant. Despite the results of the MRI showing a mensical tear and six months of consistent reports by Claimant to his physicians, Dr. Nicola implies that Claimant is malingering when he states that Claimant "has subjective symptoms which cannot be substantiated objectively." Defendants' Ex. 7, p. 5. Dr. Nicola then concludes that there is no evidence on the MRI of an acute meniscal injury and the tear is degenerative, that Claimant could not have sustained a meniscal tear as a result of the November accident because he did not have effusion in the knee or severe swelling, and that Claimant's injury was not consistent with the mechanism of injury described by Claimant. Dr. Nicola did not explicate the reasoning behind these opinions.

30. The Referee cannot reconcile Dr. Nicola's opinions with those of Drs. Sladich and Palmer and finds the latter more persuasive. Dr. Sladich had an opportunity to observe the Claimant at the time most proximate to the injury and during a number of visits thereafter to judge for himself the validity of Claimant's complaints. Dr. Sladich clearly believed that Claimant had a torn meniscus within weeks of the initial accident, and the much-delayed MRI confirmed his view. Dr. Palmer had the same information on which to base a decision as did Dr. Nicola—the MRI results, Claimant's history, and a physical exam. Both Drs. Nicola and Palmer are orthopedic surgeons, presumably familiar with injuries of the type sustained by Claimant. Yet, Dr. Palmer was not troubled by any of the particular findings that Dr. Nicola relied upon in concluding that Claimant's injury was unrelated to his industrial accident.

31. Although a temporal relationship does not prove causation, the relationship of events in time can strengthen or weaken the case for a causal relationship. In this matter, the connection between the accident and the injury was immediate and continuing. The record contains no evidence of any left knee injury, pain, complaints, or dysfunction immediately prior to the November 2004 accident. Yet from the time of the accident to the present, Claimant has reported the same pain in the same locations and exacerbated by the same activities, while exams have consistently noted the same objective findings—findings that Drs. Sladich and Palmer believed to be consistent with a meniscal tear.

32. As set out in *Hart v. Kaman Bearing & Supply*, causation must be proven by a "reasonable degree of medical probability." Neither Dr. Sladich nor Dr. Palmer expressed their opinion in terms of reasonable medical probability in their chart notes. Both physicians did respond to letters sent to them by Claimant posing the causation question in those terms. (*See*, Claimant's Ex. 6 and 9). Because of the nature of such letters, the Referee gives them very little

weight. It is always preferable to allow the experts to respond in their own words. This can be done either by letter, or in post-hearing depositions.

The lack of magic words in the physician's chart notes is not fatal to Claimant's causation claim, however. It is not a requirement that the medical records state the causation opinion in terms of medical probability. The medical records relied upon do not have to include the magic words "medical probability" or "more likely than not." What is required is that the medical evidence plainly and unequivocally conveys the opinion that events are causally related. See, *Jensen v. City of Pocatello***,** 135 Idaho 406, 412, 18 P.3d 211, 217 (2000), citing *Paulson v. Idaho Forest Indus., Inc.*, 99 Idaho 896, 901, 591 P.2d 143, 148 (1979). Dr. Palmer's chart notes clearly and unequivocally conveyed his opinion that Claimant's accident caused his injuries—the medial meniscal tear and the patellofemoral irritation.

MEDICAL CARE

33. Once a claimant has met his burden of proving a causal relationship between the injury for which benefits are sought and an industrial accident, then Idaho Code § 72-432 requires that the employer provide reasonable medical treatment, including medications and procedures. The Referee finds Defendants are obligated to pay for the care, including prescriptions and travel costs incurred for treatment of Claimant's left knee injury through the date of the hearing, as well as such other additional care, including surgery, that may be reasonably required by Claimant's treating physicians, Drs. Sladich and Palmer. To the extent that any of the previously incurred costs have been turned over for collection or have accrued penalties and interest, Defendants shall be responsible for such penalties and interest.

TPD/TTD

34. Idaho Code § 72-408 provides for income benefits (temporary total and temporary

partial disability) for injured workers during the period of recovery. Claimant is entitled to past TTDs or TPDs as appropriate, based on an average weekly wage of $538.92,[2] from November 1, 2004, through March 28, 2005.

ATTORNEY FEES

35. Claimant seeks attorney fees for the unreasonable denial of his claim. Defendants argue that they acted reasonably both in denying the claim initially and in light of questions of causation that arose subsequently.

Attorney fees are not granted to a claimant as a matter of right under the Idaho Workers' Compensation Law, but may be recovered only under the circumstances set forth in Idaho Code § 72-804, which provides:

> Attorney's fees - Punitive costs in certain cases. - If the commission or any court before whom any proceedings are brought under this law determines that the employer or his surety *contested a claim for compensation made by an injured employee or dependent of a deceased employee without reasonable ground, or that an employer or his surety neglected or refused within a reasonable time after receipt of a written claim for compensation to pay to the injured employee or his dependents the compensation provided by law,* or without reasonable grounds discontinued payment of compensation as provided by law justly due and owing to the employee or his dependents, the employer shall pay reasonable attorney fees in addition to the compensation provided by this law. In all such cases the fees of attorneys employed by injured employees or their dependents shall be fixed by the commission.

(Emphasis added.) The decision that grounds exist for awarding a claimant attorney fees is a factual determination that rests with the commission. *Troutner v. Traffic Control Company*, 97 Idaho 525, 528, 547 P.2d 1130, 1133 (1976).

[2] Calculation based on total pay received ($7,005.94) for the thirteen-week period from August 4 through November 30, 2004 ($7005.94 ÷ 13 = $538.92).

36. An award of attorney fees is appropriate in this proceeding for several reasons. First, it appears that Employer initially attempted to avoid its obligations under the workers' compensation laws by not reporting Claimant's injury to Surety. While this might be considered an oversight, there is evidence in the record that suggests that Employer's failure to report was intentional, Employer intending to handle the matter in-house. In any event, Employer did not file a claim with Surety until after Dr. Sladich contacted Surety seeking authorization for an MRI. During this time period, Employer purported to provide Claimant light duty work in keeping with his restrictions, but Claimant's unrefuted testimony clearly shows that there really was no work for him to do, and he mainly showed up and sat around for a few hours each day. When Claimant contacted the Commission regarding this arrangement, and advised Employer of the contact, three supervisors expressed displeasure to Claimant and he was moved to another job site, where he still had nothing to do. Coincidentally, it was just about this time that Dr. Sladich contacted Surety for authorization for an MRI and Employer terminated Claimant, allegedly for "failure to complete his probation." Claimant had been employed for over three months, had received a raise and two bonuses, and most importantly, had been enrolled in Employer's health insurance program, which was not available to probationary employees. Claimant had made several weekly contributions to his health insurance premiums prior to his termination, but received no benefits.

37. Surety's conduct is not above reproach either. Surety maintained its position that there had been no workplace accident until just weeks before the scheduled hearing in this matter, despite the fact that Employer never disputed that the accident had happened at the time and place and in the manner claimed in the Complaint. Surety continued to deny the claim on the basis that Claimant had a previous left knee injury, despite the lack of any evidence of such

injury in the medical records. Finally, Defendants contended that the claim was not compensable because the injury did not result from the accident.

It is also apparent that Surety and Claimant had a history of antagonism, primarily as a result of the workers' compensation claim filed with Surety during Claimant's employment with Low's Redi Mix. Claimant was outspoken in his belief that he had not been treated fairly by Surety. In turn, Defendants, lacking any evidence to support the charge, argued in their briefing that Claimant had a history of making industrial claims and taking advantage of workers' compensation programs when he chose not to work. It is absurd to suggest that Claimant fabricated his knee injury so that he could avoid work and receive benefits. Nothing in the record supports Defendants' contention that Claimant was content to sit home and collect a maximum weekly benefit of $361.08 to support his wife and five children.

While the issue of medical causation is at least arguable, it shouldn't shield Defendants from their ill-advised behavior toward this Claimant and their injudicious handling of his claim. Claimant is entitled to reasonable attorney fees for the prosecution of this proceeding.

CONCLUSIONS OF LAW

1. Claimant sustained injuries to his left knee, including a medial meniscal tear and patellofemoral irritation, as a result of his industrial accident of November 1, 2004;

2. Claimant is entitled to all medical care that he has received to date as well as such additional care, including surgery, that may be reasonably required by Claimant's treating physicians. Defendants shall also pay all interest and penalties that may have accrued on past-due accounts or accounts turned over for collection;

3. Claimant is entitled to TTDs or TPDs as appropriate for the period November 1, 2004 through March 28, 2005 based on an average weekly wage of $538.92;

4. Claimant is entitled to an award of attorney fees pursuant to Idaho Code § 72-804 for Defendants' unreasonable denial of his claim;

5. Pursuant to Idaho Code § 72-734, all compensation due and payable pursuant to this decision shall accrue interest from the date of the Commission's Order at the statutory rate of 8.375% as set by the State Treasurer effective July 1st, 2005.

RECOMMENDATION

The Referee recommends that the Commission adopt the foregoing findings of fact and conclusions of law and issue an appropriate final order.

DATED this _15___ day of December, 2005.

INDUSTRIAL COMMISSION

__/s/_____
Rinda Just, Referee

ATTEST:

_/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the _29 day of __December_____, 2005 a true and correct copy of **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon:

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djb ___/s/_____